NEOH AH YAN

v.

ONG LENG CHOO & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[ORIGINATING SUMMONS NO: S3-24-919-2004]
13 SEPTEMBER 2007

SUCCESSION: *Letters of Administration - Probate action - Application to be joined as co-administrator and beneficiary - Whether a probate action - Order 72 r. 1(2) RHC - Not merely an application to amend letters of administration - No allegation of mismanagement or misconduct by administrators - Whether court can interfere by virtue of O. 80 r. 2(3)(e) RHC - Whether application should have been commenced by way of a writ action*

CIVIL PROCEDURE: *Mode of commencement - Dispute of fact - Probate proceedings involving substantial disputes as to facts - Viva voce evidence required - Whether action should be commenced by way of writ action - Rules of the High Court 1980, O. 5 r. 4, O. 72 r. 2(1), O. 80 r. 2(3)(e)*

CIVIL PROCEDURE: *Originating summons - Conversion to writ - Plaintiff ought to have known from beginning that there were likely to be serious disputes as to material facts - Whether court should invoke its powers under O. 28 r. 8 of the RHC*

The first defendant was the wife of the deceased (Neoh Eng Hong) whom she married in 1948 in accordance with Chinese customary marriage. The marriage was later registered in 1976 under the Civil Marriage Ordinance, 1952. She and the deceased had four children including the 2nd defendant. The plaintiff claimed that the deceased had married her late mother, Wong Ah Kim in early 1960 under Chinese customary marriage. By this marriage, the deceased and the plaintiff's late mother had four children including the plaintiff. According to the plaintiff, her late mother and the deceased had been staying together since she was born. The deceased died intestate in 1992. The letters of administration in respect of the estate of the deceased were issued to the defendants. The plaintiff, claiming that she was the lawful daughter of the deceased made this application to be included as an administrator and as a beneficiary of the deceased estate. The defendants claimed that the purported marriage between the deceased and the plaintiff's mother was invalid. Amongst the issues arising was whether the action should have been proceeded with by way of a writ action instead of by way of an originating summons.

Held (striking out the originating summons with costs with liberty to the plaintiff to proceed afresh by way of a writ action):

(1) The present action was a probate action within the meaning of the term "probate action" as defined under O. 72 r. 1(2) of the RHC. It was essentially an action for the grant of letters of administration to the plaintiff; to be joined with the existing co-administrators to administer the estate. It was not merely an application to amend the letters of administration. There was no allegation of mismanagement or misconduct on the part of the administrators of the estate, where the court can interfere by virtue of O. 80 r. 2(3)(e) of the RHC and as such, O. 80 r. 2(3)(e) was inapplicable. Therefore, the present application should have been commenced by way of a writ action, as clearly provided for under O. 72 r. 2(1) of the RHC. (paras 20 & 21)

(2) Even assuming that the present action was not a probate action, it still ought to have been commenced by way of a writ action. There were substantial disputes as to the facts and it was incumbent to hear a *viva voce* evidence. Order 5 r. 4 of the RHC required the proceeding be commenced by way of a writ and not originating summons. (paras 24, 26 & 29)

(3) The court would not invoke its powers under O. 28 r. 8 of the RHC since from the very beginning the plaintiff ought to have known that there were likely to be serious disputes as to the material facts. Right from the very beginning the plaintiff must have known that originating summons was not the appropriate mode. (para 35)

Case(s) referred to:

Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1998] 4 CLJ 81 CA ***(dist)***

Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim (No 2) [1999] MLJU LEXIS 880 ***(dist)***

Jirgarlal Kantilal Doshi & Anor v. Damayanti Kantilal Doshi (Executrix) & Anor [1998] 1 SLR 211 ***(refd)***

Ligar Fernandez v. Eric Claude Cooke [2002] 6 CLJ 152 HC ***(dist)***

Ng Wan Siew v. Teoh Sin [1962] 1 LNS 110 CA ***(refd)***

Persuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors [1971] 1 LNS 104 HC ***(refd)***

Re Lee Choon Guan, Deceased Lew Ah Lui (F) v. Choa Eng Wan & Ors [1935] 1 LNS 57 HC ***(refd)***

Tan Ah Bee v. Foo Koon Thye & Another [1947] 1 LNS 106 HC ***(refd)***

Tan Khay Seng v. Tan Kay Choon & Anor [1988] 1 LNS 233 HC ***(dist)***

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC ***(refd)***

Legislation referred to:
Civil Marriage Ordinance 1952, ss. 14(1)(d), 30(b)
Rules of the High Court 1980, O. 5 r. 4, O. 28 r. 8, O. 72 rr. 1(2), 2(1), O. 80 r. 2(3)(e)

For the plaintiff - Quah Soon Wai; M/s Seow & Megat
For the defendants - Mohamed Zaid; M/s LC, Chong & Co

Reported by Amutha Suppayah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This originating summons is an application by the plaintiff to be included as one of the administrators of the estate of one Neoh Eng Hong ('the deceased') and also as one of the beneficiaries of the said estate.

[2] I have striked out the originating summons with costs but with liberty given to the plaintiff to proceed afresh by way of a writ action.

[3] I shall now give my grounds.

[4] I shall begin by alluding briefly to the background facts of the case. The first defendant, Ong Leng Choo is the wife of the deceased (Neoh Eng Hong). She married the deceased on 11 November 1948 in accordance with Chinese customary marriage. The marriage was later registered on 24 March 1976 under the Civil Marriage Ordinance, 1952. She and the deceased had four children, namely, Neoh Hoe Suan, Neoh Hoe Shin (the 2nd defendant), Neoh King Hun and Neoh Sun Meng.

[5] In the present case, it is alleged by the plaintiff that, during the subsistence of the marriage of 1st defendant with the deceased, the latter had married her late mother, Wong Ah Kim. The alleged marriage took place in the early part of the year 1960 under Chinese customary marriage. By this marriage, the deceased and the plaintiff's late mother had four children, namely, Neoh Ah Yan (the plaintiff), Neoh Siew Hwa, Neoh Ah Geat and Neoh Siew Lung. The plaintiff's mother had two other children by a previous marriage, namely, Tan Pooi Fong and Tan Pooi Fun. The plaintiff's mother died on 23 June 1997. According to the plaintiff, her late mother and the deceased had been staying together since she was born. They stayed at a premises having an address at No. 57A, Jalan Kampar, Off Jalan Pekeliling, until the death of the deceased on 23 November 1992.

[6] The deceased died intestate on 23 November 1992. On 17 August 1999, the defendants filed a petition at the High Court of Kuala Lumpur for the letters of administration in respect of the estate of the deceased. The letters of administration were issued to them.

[7] The plaintiff claims that she is the lawful daughter of the deceased by reason of the deceased's marriage with the plaintiff's late mother. She, therefore, claims that she is entitled as a beneficiary to the estate of the deceased. Hence, she applies to be included as an administrator and as a beneficiary of the deceased estate.

[8] The plaintiff alleges that the registration of the deceased's marriage with the 1st defendant is not valid by reason of s. 30(b) of the Civil Marriage Ordinance 1952 because, at the time of the registration, the deceased was (allegedly) still married to her mother under Chinese customary marriage. Section 30(b) of the Civil Marriage Ordinance provides:

> 30. Any marriage purported to be solemnized under this Ordinance shall be void if -
>
> (a) ...
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> (b) either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party;

[9] The defendants, on the other hand, contends that from the fact that the deceased registered the marriage with the 1st defendant under the 1952 Ordinance in 1976, an inference could be made that there was no other marriage (civil or custom) subsisting then between the deceased and any other person since s. 14(1)(d) of the Ordinance required the deceased, at the time of applying for the registration of his marriage to the 1st defendant, to declare that he, at that point of time, was never married to anyone else (other than the 1st defendant) under any law, religion or custom. Section 14(1)(d) reads:

> 14.(1) Every notice required to be given under the provisions of section 11 of this Ordinance shall be accompanied by a written declaration:
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> (a) ...
>
> (b) ...
>
> (c) ...

(d) that neither of the parties to the intended marriage is married under any law, custom, religion or usage to any person other than the person with whom such marriage is proposed to be contracted.

[10] Procedurewise, I find that the present application raises the following issues:

(a) whether this action is a "probate action" as defined under O. 72 r. 1(2) of the Rules of the High Court, 1980 ('the RHC');

(b) if the answer in (a) above is in the affirmative, then, whether this action should have been proceeded by way of a writ action instead of by way of an originating summons by reason of O. 72 r. 2(1) of the RHC; and

(c) whether, in any case, this action should have been proceeded by way of writ action (instead of an originating summons) since there are disputes as to the facts, as required by O. 5 r. 4 of the RHC.

[11] In regard to the issue (a) above, it is the plaintiff's contention that this action is not a "probate action" as defined under O. 72 r. 1(2) of the RHC as the letters of administration have already been issued on 8 April 2000. The plaintiff submits that the present application is merely to amend the letters of administration to include herself as an additional administrator and as an additional beneficiary of the estate of the deceased. Therefore, the plaintiff contends, O. 80 r. 2 of the RHC applies as this provision allows amendment to be made to the letters of administration, and O. 80 does not specifically require that the proceeding be instituted by way of a writ action.

[12] Order 72 r. 2(1) of the RHC provides as follows:

2(1) A probate action must be begun by writ, and the writ must be issued out of the Registry.

[13] Order 80 r. 2 of the RHC provides as follows:

2(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

[14] Order 5 r. 4 of the RHC provides as follows:

> 4(1) Except in the case of proceedings which by these rules or by under any written law are required to be begun by writ or originating summons or are required or authorized to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.
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> (2) Proceedings:
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> (a) in which the sole or principal question at issue is or is likely to be, one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or
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> (b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 81 or for any other reason considers the proceedings more appropriate to be begun by writ.

[15] The plaintiff relies on the case of *Datin Melati Bt Abdullah & Ors v. Syed Hassan Bin Syed Salim (No. 2)* [1999] MLJU LEXIS 880. The plaintiff contends that pursuant to O. 80 r. 2 of the RHC, an action may be brought for the determination of any question or the granting of any relief, which could be determined or granted in an administration action. In *Datin Melati* the proceeding was commenced by way of an originating summons. At the outset I must rule that O. 80 r. 2 of the RHC is inapplicable to the present case, and the case cited does not support the position taken by the plaintiff.

[16] Order 72 r. 1(2) of the RHC reads:

> 1(2) In these rules "probate action" means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious.

[17] In my judgment, the present action is a probate action within the meaning of the term "probation action" as defined under O. 72 r. 1(2) of the RHC. This suit is essentially an action for the grant of letters of administration to a person, that is, the plaintiff; to be joined with the existing co-administrators to administer the estate of the late Neoh Eng Hong. In other words, it is (to quote r. 1(2)) "an action for the grant of … letters of administration of the estate, of a deceased person". To my mind, it cannot be said that the present action is merely an application to amend the letters of administration. It is more than that.

[18] The case of *Datin Melati* referred to by the plaintiff can be distinguished as that case relates to an application by the plaintiffs to remove the defendant as one of the administrators of the estate of a deceased on the ground that he had failed to carry out his duties as an administrator of the estate. Further, in this case cited, the applicability of O. 72 r. 2(1) was not an issue before the court. It is also not in issue as to whether the action, which was an originating summons, should have been commenced by way of a writ action.

[19] The other cases cited by the plaintiff, namely:

(1) *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152;

(2) *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1998] 4 CLJ 81 CA; and

(3) *Tan Khay Seng v. Tan Kay Choon & Anor* [1988] 1 LNS 233, are also irrelevant for the same reason.

[20] To my mind, the present case is not one that involves an allegation of mismanagement or misconduct on the part of the administrators of the estate of the deceased, where the court can interfere by virtue of O. 80 r. 2(3)(e) of the RHC. The present case is essentially the plaintiff's application to be joined as an administrator with the existing co-administrators for the grant of letters of administration as provided under O. 72 r. 1(2) of the RHC. Therefore, O. 80 r. 2(3)(e) of the RHC is inapplicable.

[21] Since issue (a) above is answered in the affirmative, therefore, the present application should have been commenced by way of a writ action, as clearly provided for under O. 72 r. 2(1) of the RHC. This provisions stipulates:

> 2.(1) A probate action must be begun by writ, and the writ must be issued out of the Registry.

[22] The word "must" denotes that it is mandatory for the action to be begun by way of a writ action. In the Malaysian High Court Practice, at p. 2472, at para. 72.1.4, it is stated:

> [72.1.4] Actions for the revocation of grant.
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> An application to revoke grant of probate is by probate action as defined in the Probate and Administration Act 1959 (Act 97) s. 2 and RHC O. 72 r. 1(2), and is to be begun by writ: *Jirgarlal Kantilal Doshi & Anor v. Damayanti Kantilal Doshi (Executrix) & Anor* [1998] 1 SLR 211, HC (a probate action begun by originating motion may be struck out on application by the defendants).

[23] In *Jirgarlal Kantilal Doshi & Anor v. Damayanti Kantilal Doshi (Executrix) & Anor* [1998] 1 SLR 211, Choo Han Teck JC said:

> Mr. Manjit Singh had also submitted that the plaintiffs initiated the wrong originating process. He argued that this originating motion was the wrong process and on this ground alone the application ought to be dismissed.
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> Section 2 of the Probate and Administration Act (Cap 251) defines 'Probate action' as 'a cause or matter in which a petition for probate or letters of administration is contested by any person, and includes any application to alter or revoke the grant of any probate or letters of administration'. This clearly included the present action to revoke the grant of probate to the defendants. The definition of a probate action is repeated in O. 72 r. 1(2) of the Rules of High Court 1996.
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> By O. 72 r. 2(1) the Rules stipulate that a 'probate action must be begun by writ, and the writ must be issued out of the Registry'. Rule 2(2) requires that the writ must be endorsed with a statement of the nature of the interest of the plaintiff and the defendant in the estate before the writ is issued. Rule 2(3) further stipulates that a writ shall not issue unless a citation under r. 7 has been issued or the probate has been lodged with the registry. In this case there was no issue of a citation and the probate was not lodged with the registry (since it was not yet extracted).
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> These rules as set out in the Rules of Court clearly required an action of the sort that the plaintiffs had taken out to be begun by writ in accordance with O. 72. Furthermore, under O. 5 r. 5, a party may proceed by way of an originating motion 'if, but only if, by these Rules or by any written law the proceedings in question are required or authorized to be so begun'. I agree with Mr Manjit Singh that the wrong procedure was adopted. It is fairly serious error and one which would have justified the defendants striking it out if such an application had been made in the first instance. However, as counsel for the defendants elected to oppose the motion on merits no application was made to strike out the motion. Since no prejudiced was occasioned to either party, I decided to hear the application on its merits.

[24] In relation to the third issue (c), in my judgment, even assuming for the moment that the present action is not a probate action, it still ought to have been commenced by way of a writ action. In contending that there are no disputes as to the facts, the plaintiff refers to the 2nd defendant's letter at exh. NAY-6 of encl. 2, where the 2nd defendant has admitted that the plaintiff has an interest in the estate of the deceased. The plaintiff contends that this evidence is sufficient to show that it is not necessary to call witnesses and expert evidence to verify any document. It is further submitted by the plaintiff that if this court

is of the view that this action should have been by way of a writ action, since it involves dispute as to facts, in the interest of justice, the court may order the proceedings to continue as if the cause or matter had begun by writ, as provided under O. 28 r. 8 of the RHC.

[25] Now, exh. NAY-6 at encl. 2 is a letter from the 2nd defendant to the plaintiff's solicitors informing the plaintiff's solicitors that the defendants are not so sure about the estate of the deceased and seek the plaintiff solicitors' assistance to check on this matter. Further, there is another letter, that is exh. NAY-8 of encl. 2, which is a letter from the defendants' solicitors to the plaintiff's solicitors stating that the defendants have never recognized the plaintiff, her siblings and the late Wong Ah Kim (plaintiff's mother) as being the "children" and "the second wife" of the late Neoh Eng Hong. Therefore, it is the contention of the defendants that the plaintiff and her siblings do not have any rights of succession or administration to the estate of Neoh Eng Hong.

[26] In my judgment, in the light of the foregoing, the matter before me is too contentious and it is inappropriate to be determined merely by way of affidavit evidence. There are substantial disputes as to the facts and it is incumbent to hear a *viva voce* evidence. The court has to decide *inter alia*, on the following principal issues:

(a) whether the plaintiff's late mother was ever married to the deceased under Chinese customary marriage in early 1960; and

(b) whether the plaintiff and her siblings are the lawful children of the deceased and plaintiff's late mother.

[27] It hardly needs adding here that the burden of proving facts (a) and (b) above is on the plaintiff. In *Tan Ah Bee v. Foo Koon Thye and Another* [1947] 1 LNS 106 Carey J said:

> It is established that a Chinese man may have as many wives as he may disposed to. Usually, he has a principal wife and may have several wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of a wife in order that a secondary marriage may be established.

[28] In *Re Lee Choon Guan, Deceased Lew Ah Lui (F) v Choa Eng Wan & Ors* [1935] MLJ 78 Terrell J. held that in order for a party to satisfy the court of the existence of a Chinese secondary marriage he must prove three things, namely:

(a) cohabitation;

(b) an intention to form a permanent union; and

(c) recognition.

[29] As there are questions of facts involved, these issues of facts can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined. I hold that, in any event, even assuming that O. 72 r. 2(1) of the RHC does not apply, still O. 5 r. 4 of the RHC requires that this proceeding be commenced by way of a writ action and not by originating summons (see *Persuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 1 LNS 104; *Ng Wan Siew v. Teoh Sin* [1962] 1 LNS 110; and *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC).

[30] In *Persuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 1 LNS 104 where Raja Azlan Shah J (as he then was) held that:

> When a question of fact is at issue action is to be by way of writ and not by originating summons because disputed question of fact and law are involved. This is because the facts have to be established by examination and cross-examination of witnesses.

[31] In *Ng Wan Siew v. Teoh Sin* [1962] 1 LNS 110 Thomson CJ (as he then was) in delivering the decision of the Court of Appeal said:

> It is to effect that these proceedings should have been started by writ and not by originating summons. Theoretically, they could have been started either by writ or originating summons but it has been said again and again that when it is known that there is going to be conflict of testimony and a necessity for taking parol evidence the proceedings should have been commenced by writ and a plaintiff if successful may be deprived of any additional costs caused by his having commenced proceedings by way of originating summons.

[32] In *Ting Ling Kiew & Anor v. Tan Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC, it was held by Supreme Court that:

> Unquestionably, these conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidenced which, however, was not possible in proceedings begun by originating summons.

[33] Order 28 r. 8 of the RHC, as referred to by the learned counsel by the plaintiff, gives the court the discretionary power to order the present proceedings to continue as if the cause or matter had begun by writ.

[34] Rule 8 states:

> 8.(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause of matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

[35] Since the present case involves serious disputes as to the facts, I think that it is inconvenient that this action should proceed by way of an originating summons. I am not inclined to invoke my powers under O. 28 r. 8 of the RHC, as suggested by the learned counsel. For it is clear, from the very beginning the plaintiff ought to have known that there are likely to be serious disputes as to the material facts. In other words, right from the very beginning the plaintiff must have known that originating summons is not the appropriate mode.

[36] Hence, the originating summons is struck off with costs with liberty to the plaintiff to proceed afresh by way of a writ action.